(19,266.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 206.

WILLIAM K. VANDERBILT ET AL., AS EXECUTORS, &c.,

vs.

FERDINAND EIDMAN, AS UNITED STATES COLLECTOR OF INTERNAL REVENUE.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 13, 1904.

1 United States Circuit Court of Appeals for the Second Circuit.

WILLIAM K. VANDERBILT ET AL., as Executors, etc., Plaintiffs in Error, *against* FERDINAND EIDMAN, as United States Collector of Internal Revenue, Defendant in Error.	Error to the Circuit Court of the United States for the Southern District of New York.

Certificate to the Supreme Court of the United States certifying certain questions of law concerning which the instruction of the Supreme Court is desired for the proper decision of the above entitled action pursuant to the provisions of section 6, chapter 517, of the act of March 3rd, 1891, entitled "An act to establish circuit courts of appeal and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes."

Statement of Facts.

The above entitled action was commenced in the United States circuit court for the southern district of New York, by the above named William K. Vanderbilt *et al.*, as executors, etc., to recover of the above named Ferdinand Eidman, United States collector of internal revenue etc., the sum of $311,681.36, which sum was assessed June 26, 1901, and collected September 3, 1901, by the said
2 collector from the said William K. Vanderbilt *et al.*, as executors etc., under protest, as a tax on a legacy, arising from personal property, pursuant to sections 29 and 30 of the act of June 13, 1898 (30 U. S. Statutes at Large, 464), entitled "An act to provide ways and means to meet war expenditures and for other purposes," and of said act as amended by the act of March 2, 1901, entitled "An act to amend an act entitled 'An act to provide ways and means to meet war expenditures, and for other purposes,' approved June thirteenth, eighteen hundred and ninety-eight, and to reduce taxation thereunder." (31 Stat., 946.)

The above-named defendant in said action in the circuit court demurred to the complaint of the above-named plaintiffs in said action, on the general ground that the complaint did not state facts sufficient to constitute a cause of action. The United States circuit court sustained said demurrer, and directed judgment to be entered in favor of the defendant dismissing said complaint, and for costs and disbursements of the action, which judgment was entered.

The said judgment was brought into this court for review by a writ of error duly sued out by the plaintiffs in said action, and the cause having come on for hearing and argument in this court, certain questions of law arose, concerning which this court desires the

instruction of the United States Supreme Court for its proper decision and which questions arose from the following facts:

Cornelius Vanderbilt died in the city of New York on September 12th, 1899, leaving a will which was thereafter duly admitted
3 to probate, the seventeenth clause of which will provided as follows:

"Seventeenth: All the rest, residue and remainder of all the property and estate, real, personal and mixed, of every description, and wheresoever situated, of which I may die seized or possessed, or to which I may be entitled at the time of my decease, including all lapsed legacies and the principal of any annuities which may terminate and any part of my estate which may not have been effectually devised or bequeathed or from any other source, I give, devise and bequeath to my executors, hereinafter named, and the survivors and survivor of them, IN TRUST, to hold said estate and invest and reinvest the same and to collect the rents, issues, income and profits therefrom for the use of my son Alfred G., and to apply so much of said net income as may be in their judgment advisable, to his support, maintenance and education, and for the care and maintenance of his property during his minority, and to accumulate any surplus income, such accumulations to be paid to him when he arrives at the age of twenty-one years and thereafter to pay the net income of said estate to him as received until he arrives at the age of thirty years, when he shall be put in full possession of one-half of the portion of said estate to be set apart for that purpose by my executors and the survivors of them. And upon further trust thereafter to pay to my said son, Alfred G. the income from the balance remaining of said estate until he shall arrive at the age of thirty-five years, when he shall be put in possession of the balance of said trust estate, and the said trustees shall be discharged from any and all liability and responsibility in respect thereof. If my son Alfred G. should die before attaining the age of thirty-five years, leaving issue, such portion of the estate as shall not then have come into his possession shall be divided by my executors into as many equal shares as he may leave children him surviving, and one share shall be held by my executors to the use of each such child or children until he or she shall attain the age of twenty-one years, when it shall be paid to such child; but if he shall die without child or children, or if none of his children shall attain majority, then it is my will that my son Reginald C. shall in all respects, as to said residuary estate stand in the place and stead of his brother Alfred G., and that if Alfred G. shall die without issue before he attains the age of thirty years, then Reginald C. shall receive the income from said estate until he attains the age of thirty years, when he shall be put in possession of one-half of the residuary estate, and thereafter Reginald C. shall receive the net income of the remaining one-half of my estate, and on arriving at the age of thirty-five years he shall be put in possession of the whole of said estate, and my said executors shall hold said estate upon such trust, and I give and devise the same accord

ingly. If Alfred G. and Reginald C. shall both die before being put into possession of said estate, and without issue, I give whatever then remains of my residuary estate to my daughters Gertrude and Gladys Moore, share and share alike; and if either of my said daughters be then dead leaving issue, her issue to take his or her mother's share, *per stirpes* and not *per capita;* and in default of issue, the survivor shall take the principal."

This clause contains the only provisions in the will relating to or in any manner affecting the disposition of the residuary estate of the testator and determining the extent and character of the interests therein.

All of the children of said Cornelius Vanderbilt named in the said seventeenth clause of his will survived him and were living at the time this suit was brought. At the time of the death of the said Cornelius Vanderbilt his son Alfred G. Vanderbilt was between twenty-two and twenty-three years of age, and his son Reginald C. Vanderbilt was between nineteen and twenty years of age, and both were unmarried.

The appraised value of the residuary personal estate at the time of the testator's death was $18,972,117.46.

The appraised value of Alfred G. Vanderbilt's interest in the income of the residue until he becomes thirty years of age was $5,119,612.43. With respect to this interest the executors of Cornelius Vanderbilt paid an internal revenue tax under sections 29 and 30 of the "War revenue act" of June 13, 1898, at the rate of 2½ per cent. thereon, amounting to $115,191.28.

The Commissioner of Internal Revenue thereafter, under the alleged authority of sections 29 and 30 of said "War revenue act," assessed with respect to Alfred G. Vanderbilt's interest in the residue an internal revenue tax at the rate of 2½ per cent. on the full appraised value of the residue, amounting as aforesaid, to $18,972,117.46,

Which tax amounted to	$426,872.64
Against this was credited the tax already paid on the interest above referred to, such interest being included in the entire value of the residue, which tax amounted to	115,191.28
Leaving an unpaid balance of the tax assessed as aforesaid, amounting to	$311,681.36

In making this assessment the Commissioner of Internal Revenue claimed and assumed that, because according to the average of chances shown by the mortality tables at the time of the death of Cornelius Vanderbilt, Alfred G. Vanderbilt had an expectancy of life beyond the period when if he lives so long he will become absolutely entitled to the entire principal of the residury estate, he was to be considered for the purposes of assessing the taxes imposed by sections 29 and 30 of the said act of Congress of June 13, 1898, as

then having a present vested interest in the entire principal of the residue.

The unpaid balance of this assessment was paid by the executors under protest and upon compulsion of the collector's threat of distraint and sale, on the 3rd day of September, 1901. The executors thereupon made the statutory application to the Commissioner of Internal Revenue for its refund, which was refused, and this action for the recovery of said amount so paid was thereupon commenced in the circuit court for the southern district of New York, as above set forth.

On the foregoing statement of facts, the United States circuit court of appeals for the second district desires the instruction of the United States Supreme Court on the following questions:

I. Is the tax imposed by sections 29 and 30 of the act of Congress of June 13, 1898, entitled "An act to provide ways and means to meet war expenditures, and for other purposes," with respect
6 to Alfred G. Vanderbilt's interest under the seventeenth clause of the will of Cornelius Vanderbilt, a tax upon the transmission to and receipt by the trustees of the property passing to them as trustees under the legacy out of which such interest arises?

II. If the preceding question is answered in the negative, is the tax imposed under said act with respect to Alfred G. Vanderbilt's interest under said seventeenth clause a tax upon the transmission to and receipt by said Alfred G. Vanderbilt of his beneficial interest in the property passing under such legacy?

III. Did sections 29 and 30 of said act authorize the assessment and collection of a tax with respect to any of the rights or interests of Alfred G. Vanderbilt as a residuary legatee of the personal estate of Cornelius Vanderbilt under the seventeenth clause of the will, with the exception of his present right to receive the income of such estate until he attains the age of thirty years, prior to the time when, if ever, such rights or interests shall become absolutely vested in possession or enjoyment?

IV. If the tax under sections 29 and 30 of said act was presently assessible and collectible upon all the interests of Alfred G. Vanderbilt in said legacy, was the clear value of all such interests, for the purposes of computing the tax, equal to the full value of the property comprised in the legacy out of which such interests arose?

And this court hereby certifies such questions to the Supreme Court of the United States.

It is therefore ordered that a copy hereof, certified under
7 the seal of the court, be transmitted to the clerk of the Supreme Court of the United States.

WM. J. WALLACE,
E. HENRY LACOMBE,
WM. K. TOWNSEND,
Judges of the U. S. Circuit Court of Appeals for the 2nd Circuit.

8 SOUTHERN DISTRICT OF NEW YORK, } *Second Circuit.*

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing certificate in the case of William K. Vanderbilt *et al.*, as executors, etc., against Ferdinand Eidman, as collector of internal revenue, was duly filed and entered of record in this office on the 3rd day of March, 1904, and under the direction of the judges of said court, said certificate is forwarded to the Supreme Court of the United States for its action thereon.

New York, March 4, 1904.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

9 [Endorsed:] United States circuit court of appeals for the second circuit. William K. Vanderbilt, *et al.* as executors &c., plaintiffs in error, against Ferdinand Eidman as United States collector of internal revenue, defendant in error. Certificate to the Supreme Court. United States circuit court of appeals, second circuit. Filed Mar. 3 1904 William Parkin, clerk.

Endorsed on cover: (Certificate.) File No. 19,266. U. S. C. C. of appeals, 2nd circuit. Term No. 206. William K. Vanderbilt *et al.*, as executors, &c., *vs.* Ferdinand Eidman, as United States collector of internal revenue. Filed March 10", 1904. File No. 19,266.